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OCT 14 1998

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Before the
UNITED STATES COPYRIGHT OFFICE
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Washington, D.C.

In the Matter of	
DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING	Docket No. 96-4 CARP DPRA

MEMORANDUM OF NMPA, SGA AND RIAA REGARDING ADOPTION OF RATES FOR GENERAL DIGITAL PHONORECORD DELIVERIES

National Music Publishers' Association, Inc. ("NMPA"), the Songwriters Guild of America ("SGA"), and the Recording Industry Association of America, Inc. ("RIAA") (collectively the "Petitioners") request that the Copyright Office:

(a) issue final regulations adopting the unopposed rate for general DPDs and schedule for future proceedings set forth in sections 255.5 and 255.7 of the proposed regulations filed by Petitioners on November 5, 1997 ("Proposed Regulations"); and

(b) issue final regulations adopting the rates for incidental DPDs set forth in section 255.6 of the Proposed Regulations (with the clarifications suggested in Petitioners' July 21, 1998 Memorandum to the Copyright Office to address the comments filed by other parties concerning incidental DPDs) or, in the alternative, sever and defer, until the next rate adjustment proceeding, the issue of rates for incidental DPDs.

Background

On November 5, 1997, Petitioners filed a Joint Petition for Adjustment of Physical Phonorecord and Digital Phonorecord Delivery Royalty Rates (the "Joint Petition"). In the Joint Petition, Petitioners asked the Copyright Office to promulgate regulations for the making and distribution of both physical phonorecords and digital phonorecord deliveries, as contemplated by 17 U.S.C. § 115. *See* Proposed Regulations § 255.3 (rates for physical phonorecords); § 255.5 (general DPDs); § 255.6 (incidental DPDs); § 255.7 (schedule for future DPD proceedings). As required by section 115(c)(3)(D), the Proposed Regulations distinguished between "digital phonorecords in general" and those "where the reproduction or distribution of the phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery."

The Copyright Office published the Proposed Regulations in the *Federal Register* on December 1, 1997. *See* Notice of Proposed Rulemaking in the Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 62 Fed. Reg. 63506 (Dec. 1, 1997) ("December 1 Notice"). In response to the December 1 Notice, the Copyright Office received comments from the Coalition of Internet Webcasters ("CIW"), the United States Telephone Association ("USTA") and Broadcast Music, Inc. ("BMI"). None of the commenting parties objected to the Proposed Regulations insofar as they pertained to the rates for physical phonorecords, general DPDs or the proposed schedule for future proceedings. USTA and CIW, however, expressed certain objections to section 255.6 of the Proposed Regulations concerning incidental DPDs. *See* Comments and Notice of Intent to Participate of USTA (Dec. 30, 1997); Comments and Notice of Intent to Participate of CIW (Dec. 29, 1997) ("CIW Comments"). BMI sought

clarification "that the Section 115 compulsory license does not apply to any rights of public performance that may exist in the digital transmissions subject to the compulsory license." Comments of BMI (Dec. 29, 1997), at 3.

Because no objection was made to the proposed rates for physical phonorecords, the Copyright Office bifurcated the rate adjustment proceeding and adopted the rates for physical phonorecords in section 255.3 of the Proposed Regulations, effective as of January 1, 1998. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 63 Fed. Reg. 7288 (Feb. 13, 1998).

USTA's comments with respect to proposed section 255.6 were resolved by negotiated amendments to that section acceptable to all the parties. No party has disputed BMI's clarification (which may be addressed by preamble to the regulations). The only outstanding issue is CIW's disagreement with the treatment of incidental DPDs in the Proposed Regulations.

On July 21, 1998, Petitioners submitted a memorandum urging that the Copyright Office adopt the Proposed Regulations on the ground that neither a CARP nor the Copyright Office had the authority to resolve the issues raised by CIW with respect to incidental DPDs. Memorandum of NMPA, SGA and RIAA Regarding Disposition of the Digital Phonorecord Delivery Rate Adjustment Proceeding ("Joint Memorandum"). On August 7, 1998, CIW's counsel submitted a response to the Joint Memorandum, "renew[ing] its objections to the [P]roposed [R]egulations." Response of the Coalition of Internet Webcasters to the NMPA, SGA and RIAA Joint Memorandum at 2.

No party has requested that a CARP be empaneled.

The Proposed Rate for General DPDs and Schedule for Future Proceedings are Unopposed and Should be Adopted

Because no "opposing comment" has been received from any party with respect to the rate for general DPDs proposed in section 255.5, the Copyright Office may adopt that rate without further proceedings. *See* 37 C.F.R. § 251.63. Moreover, there is a need to adopt such a rate now as prospective licensees wish to avail themselves of the compulsory license for general DPDs. In order to preserve the distinction drawn in the Proposed Regulations between general and incidental DPDs, in accordance with section 115(c)(3)(D) of the Copyright Act, we suggest that section 255.5 be modified to make clear that the rate specified there applies to general and not incidental DPDs, as defined in section 115(c)(3)(D) of the Copyright Act.[1/]

Petitioners similarly request that the Copyright Office adopt the schedule for future proceedings set forth in section 255.7 of the Proposed Regulations, as to which no opposing comment has been filed.[2/]

The Issue of Rates for Incidental DPDs Should be Severed for Separate Consideration

The Joint Petition proposed rates for incidental DPDs. Proposed Regulations § 255.6. USTA filed comments concerning the "transient phonorecord" provision (§ 255.6(b)) of the Proposed Regulations concerning incidental DPDs. CIW had similar comments on that provision. Petitioners agreed to certain clarifying amendments to that provision proposed by USTA, which all parties accepted and Petitioners submitted to the Copyright Office with their Joint Memorandum.

1/ Attached hereto as Exhibit A are clean and blacklined copies of section 255.5 as thus modified.

2/ A copy of section 255.7 of the Proposed Regulations is attached as Exhibit B.

CIW also contested Petitioners' proposed regulations with respect to incidental DPDs to the extent they might be construed as covering "streaming audio." As discussed more fully in our Joint Memorandum, Petitioners pointed out that neither the Copyright Office nor a CARP had the authority to determine whether "streaming audio" is a DPD and suggested that CIW's concern be addressed by a preamble stating that the regulations do not determine whether streaming media activities constitute DPDs under the Copyright Act.

Significantly, no party requested that a CARP be empaneled -- not surprisingly given the high cost of a CARP proceeding and the likely futility of such a proceeding in light of a CARP's lack of authority to determine whether "streaming audio" is a DPD.

Accordingly, Petitioners remain of the view that the Copyright Office should adopt the proposed rates for incidental DPDs with the clarifications suggested in Petitioners' Joint Memorandum, which we believe fairly address the parties' comments, as well as the proposed rate for general DPDs.

In the event that the Copyright Office is not prepared to adopt Petitioners' proposed regulations for incidental DPDs at this time, Petitioners respectfully urge that the Copyright Office sever this issue. As the Copyright Office previously recognized in bifurcating this proceeding and adopting the proposed rates for physical phonorecords, it is in the interest of all concerned to finalize rates as soon as practicable. Establishing rates for general DPDs is important to facilitate the licensing of such activities.

It is particularly important that the rates for general DPDs be set because there is a demand for licenses of general DPDs. The same urgency is not present with

regard to the rates for incidental DPDs. To the best of our knowledge, no one has requested a compulsory license for incidental DPDs. Moreover, Petitioners are the only parties who petitioned to set rates for incidental DPDs. Even if the rates we proposed were adopted, under the schedule proposed for future proceedings, a petition to revise those rates could be filed as early as January 1999. We therefore recommend that the issue of rates for incidental DPDs be deferred until the next rate adjustment proceeding in the event that the Copyright Office is not prepared at this time to adopt the regulations that Petitioners have proposed for incidental DPDs.

CONCLUSION

Although we continue to believe that the Copyright Office should adopt the Proposed Regulations in their entirety, as previously suggested in our Joint Memorandum, Petitioners urge in the alternative that the Copyright Office adopt the unopposed rate for general DPDs and schedule for future proceedings set forth in sections 255.3 and 255.7 of the Proposed Regulations and sever and defer, until the next rate adjustment proceeding, the issue of rates for incidental DPDs.

Dated: October 13, 1998

Respectfully Submitted,

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Exhibit A

Section 255.5 is revised by adding the following new paragraph:

(b) For every digital phonorecord delivery made on or after January 1, 1998, except for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, as specified in 17 U.S.C. § 115(c)(3)(C) and (D), the royalty rate payable with respect to each work embodied in the phonorecord shall be the royalty rate prescribed in section 255.3 for the making and distribution of a phonorecord made and distributed on the date of the digital phonorecord delivery (the "Physical Rate"). In any future proceeding under 17 U.S.C. § 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

Exhibit A

Section 255.5 is revised by adding the following new paragraph:

(b) ~~Except as provided in section 255.6, for~~ **For** every digital phonorecord delivery made on or after January 1, 1998, **except for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, as specified in 17 U.S.C. § 115(c)(3)(C) and (D),** the royalty rate payable with respect to each work embodied in the phonorecord shall be the royalty rate prescribed in section 255.3 for the making and distribution of a phonorecord made and distributed on the date of the digital phonorecord delivery (the "Physical Rate"). In any future proceeding under 17 U.S.C. § 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

Exhibit B

Section 255.7 Future proceedings.

The procedures specified in 17 U.S.C. § 115(c)(3)(C) shall be repeated in 1998 and every second year thereafter until 2006 so as to determine the applicable rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. The procedures specified in 17 U.S.C.shall be repeated, in the absence of license agreements negotiated under 17 U.S.C. § 115(c)(3)(B) and (C), upon the filing of a petition in accordance with 17 U.S.C. § 803(a)(1), in 1999 and every second year thereafter until 2007 so as to determine new rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. Thereafter, the procedures specified in 17 U.S.C. § 115(c)(3)(C) and (D) shall be repeated in each fifth calendar year. Notwithstanding the foregoing, different years for the repeating of such proceedings may be determined in accordance with 17 U.S.C. § 115(c)(3)(C) and (D).

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of October, 1998, served the foregoing Memorandum of NMPA, SGA and RIAA Regarding Adoption of Rates for General Digital Phonorecord Deliveries by mail to the following counsel.

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